

17
TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 278.

**THE HAMMOND PACKING COMPANY, PLAINTIFF IN
ERROR,**

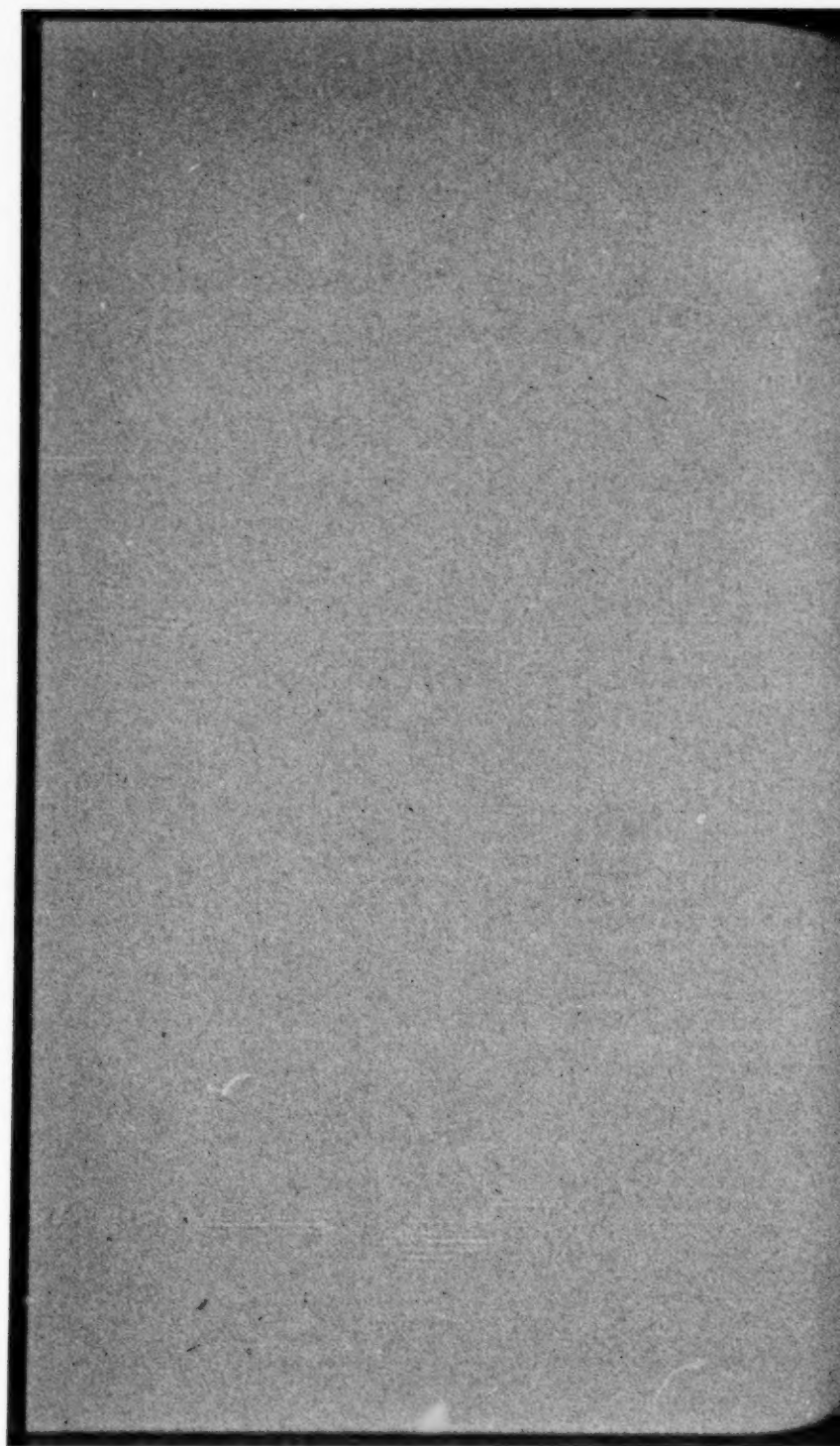
vs.

THE STATE OF MONTANA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

FILED JUNE 15, 1912.

(23,256.)



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SUPREME COURT OF THE UNITED STATES.

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1 In the Supreme Court of the State of Montana.

THE STATE OF MONTANA, Respondent,

v.

HAMMOND PACKING COMPANY, a Corporation, Appellant.

Albert J. Galen, Attorney General; Thomas J. Walker, County Attorney; Louis P. Donovan, Attorneys for Respondent.

M. S. Gunn, Gunn, Rasch & Hall, Attorneys for Appellant.

Transcript on Appeal from the District Court of the Second Judicial District of the State of Montana in and for the County of Silver Bow.

2 In the District Court of the Second Judicial District of the State of Montana in and for the County of Silver Bow.

THE STATE OF MONTANA, Plaintiff,

v.

HAMMOND PACKING COMPANY, a Corporation, Defendant.

Complaint.

Comes now the plaintiff and for cause of action against the defendant alleges:

First. That the State of Montana, plaintiff, is a public corporation duly organized and existing.

Second. That the defendant, the Hammond Packing Company, is now and at all times hereinafter mentioned, was a corporation, organized and existing under and by virtue of the laws of the state of Illinois, and doing business in the county of Silver Bow, State of Montana.

Third. That on the first day of January, 1904, and upon each succeeding day subsequent thereto, in the years 1904 and 1905, in the county of Silver Bow, State of Montana, the said defendant did attempt to carry on, and then and there carried on the business of selling oleomargarine, butterine and imitation of cheese; and
3 the said defendant was then and there required by the provision of section 4064, as amended and approved on the 4th day of March, 1901, to take out a license thereto, in pursuance of said section. And the defendant then and there so carried on said business without such license, and without any license thereto, and the said defendant did then and there unlawfully fail, neglect and refuse to take out the license in such case by said section provided, and still neglects and refuses so to do.

Fourth. That as plaintiff is informed and believes and so states the fact to be, between the first day of January, 1904, and the 31st day of December, 1905, both days inclusive, the defendant sold one million pounds of oleomargarine, one million pounds of butterine, and one hundred thousand pounds of imitation of cheese.

Fifth. That by said section 4064, as amended, a license of one cent per pound for all of said articles so sold, as aforesaid, was and is required to be paid to the county treasury of Silver Bow county, State of Montana.

Sixth. And by reason of the premises the sum of Twenty-one Thousand (\$21,000) dollars is unpaid and owing from the said defendant, and payable by said defendant to the county treasury of the county of Silver Bow, and State of Montana; and the said defendant though often requested to do so, has not paid the said sum of money, or any part thereof, but has hitherto wholly neglected and refused, and still refuses to pay the same.

Seventh. That this action is brought by direction of the county treasurer of Silver Bow county, Montana.

4 Wherefore, said plaintiff prays judgment against the said defendant for the sum of Twenty-one Thousand dollars, together with fifteen dollars damages, as provided by law, and the costs of this action.

JAMES E. HEALY,
*County Attorney in and for Silver
Bow County, Montana.*

Filed: March 7, 1906.

Title of Court.

Title of Cause.

Bill of Exceptions.

Be it remembered, that on to-wit the 22d day of March, 1906, and before the time for the defendant to appear in said action had expired, said defendant filed its petition for a removal of said cause to the circuit court of the United States, ninth circuit, in and for the district of Montana which said petition is as follows:

Title of Court.

Title of Cause.

Petition for Removal.

To the Honorable the District Court of the Second Judicial District of the State of Montana in and for the County of Silver Bow:

Your petition-, Hammond Packing Company, the defendant in the above entitled action, respectfully shows unto this Honorable Court:

5 1. That your petitioner was at the time of the commencement of this action, prior thereto, ever since has been and is now a corporation organized and existing under and by virtue of the laws of the State of Illinois, and a citizen of that state, and a non-resident of the State of Montana.

2. That the county of Silver Bow, mentioned in the complaint in said action, was at the time of the commencement of this action, prior thereto, ever since has been and is now a county within the State of Montana, and a corporation created and existing under and by virtue of the laws of said state.

3. That the State of Montana was named as plaintiff in said action by virtue of a provision of section 4044 of the Political Code of Montana, reading as follows: "Against any person required to take out a license who fails, neglects or refuses to take out such license, or who carries on or attempts to carry on business without such license the county treasurer may direct suit in the name of the State of Montana as plaintiff to be brought for the recovery of the license tax."

4. That it is provided in section 4050 of said Political Code that "all moneys collected for licenses must be paid into the treasury of the county in which the same was collected, seventy-five per cent thereof for the use of the county, and twenty-five per cent thereof must be paid over by the county treasurer to the state treasurer for the use of the state."

5. That the said action is prosecuted in the name of the State of Montana for the use and benefit of the county of Silver Bow, and the county of Silver Bow is the real party plaintiff, and the state is only nominally the plaintiff.

6. That the matter and amount in dispute in said action, which is of a civil nature and at law, exceeds (exclusive of interest and costs) the sum or value of two thousand dollars.

7. That the purpose of said action is to recover a judgment against your petitioner for the sum of twenty-one thousand dollars alleged and claimed to be due and owing from your petitioner for having carried on the business of selling oleomargarine, butterine and imitation of cheese during the years 1904 and 1905 in Silver Bow county, Montana, and having during said time sold in said county one million pounds of oleomargarine, one million pounds of butterine and one hundred thousand pounds of imitation cheese, without having paid the license tax for carrying on said business and making said sales, required by section 4064 of the Political Code of Montana, as amended by an Act approved the 4th day of March, 1901.

8. That the time within which defendant may appear and plead in said action has not expired and will not expire until the 27th day of March, 1906, the summons in said cause having been served on the 7th day of March, 1906.

9. And your petitioner offers and files herewith a bond, with good and sufficient surety, for its entering in the circuit court of the United States, ninth circuit, in and for the district of Montana, on the first day of its next session, a copy of the record in this action, and for paying all costs that may be awarded by said circuit court of the United States, if said court shall hold that this action was improperly or wrongfully removed thereto.

7 Wherefore, your petitioner prays that this court do accept this petition and the said bond and approve the same, and proceed no further in said action save to cause the record

therein to be removed to the circuit court of the United States, ninth circuit, in and for the district of Montana.

Dated this 17th day of March, 1906.

HAMMOND PACKING COMPANY,
By M. S. GUNN, *Its Attorney*.

(Duly verified.)

Filed March 22, 1906.

And at the same time defendant also filed a bond on removal, which said bond is as follows:

Title of Court.

Title of Cause.

Bond on Removal.

Know all men by these presents:

That Hammond Packing Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois, as principal, and the United States Fidelity and Guaranty Company, a corporation organized and existing under and by virtue of the laws of the State of Maryland, as surety, are held and firmly bound unto the State of Montana in the penal sum of one hundred dollars, for the payment of which well and truly to be made to the said State of Montana, plaintiff, do bind themselves, their successors and assigns, jointly and severally, firmly by these presents.

Signed and sealed this 17th day of March, 1906.

The condition of the foregoing obligation is such that,

8 Whereas, the said Hammond Packing Company, defendant in the above entitled action, is about to petition the district court of the second judicial district of the State of Montana in and for the county of Silver Bow, for the removal of a certain cause therein pending, wherein the State of Montana is plaintiff and Hammond Packing Company is defendant, to the circuit court of the United States, ninth circuit, in and for the district of Montana:

Now, if the said Hammond Packing Company shall enter in the said circuit court of the United States, ninth circuit, in and for the district of Montana, on the first day of its next session, a copy of the record in said suit, and well and truly pay all costs that may be awarded by said circuit court, if such court shall hold that such suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise it shall remain in full force and virtue.

HAMMOND PACKING COMPANY. [SEAL.]

By M. S. GUNN, *Its Attorney*.

[L. S.] UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY. [SEAL.]

By FRANK HOBART, *Its Attorney-in-Fact*.

Filed March 22, 1906.

That thereupon the said defendant presented to the Honorable Geo. M. Bourquin, judge of the above entitled court, said petition and bond and requested said judge to make and sign an order in said cause, removing the same to the United States circuit court for the district of Montana and to proceed no further with said cause, which said request was refused, to which action and decision of said judge the defendant at the time excepted and now presents this its bill of exceptions thereto, which is hereby settled, allowed and signed as correct.

Dated this 22d day of March, 1906.

GEO. M. BOURQUIN, *Judge.*

It is hereby stipulated that the above and foregoing bill of exceptions may be settled, allowed and signed as correct.

JAMES E. HEALY,
Attorney for Plaintiff.

M. S. GUNN,
Attorney for Defendant.

Filed March 22, 1906.

Title of Court.

Title of Cause.

Amended Answer.

Now comes the defendant and for amended answer to plaintiff's complaint herein:

I.

Admits the allegations of paragraphs 1 and 2 of said complaint.

Further admits that it has never taken out or paid for a license as provided in section 4064 of the Political Code of Montana, as amended by the Act approved March 4, 1901, and that it has never paid to the county treasurer of Silver Bow county, or any one, the license fee of one cent per pound, as required by section 4064 of the Political Code as amended, or any other license fee for making the sales of oleomargarine as hereinafter alleged, and that it has at all times and still refuses to pay the same.

II.

Denies that between the 31st day of December, 1903, and the first day of January, 1905, this defendant sold in Silver Bow county, Montana, any butterine or imitation of cheese or any oleomargarine in excess of 40.656 pounds, and alleges the facts to be with reference to the business conducted by this defendant in Silver Bow county, Montana, and the sales of oleomargarine during said period in said county as follows:

1. That at all the times in the complaint mentioned the defendant had a warehouse and fixed place of business in Silver Bow county, Montana, and carried on in said county the business of selling

oleomargarine and other products and merchandise; that at said place of business in said county between the first day of January, 1904, and the 31st day of December, 1905, the defendant transacted the following business, to-wit: Defendant sold and delivered between said days forty thousand six hundred fifty-six (40,656) pounds of oleomargarine in said county of Silver Bow, State of Montana.

11 2. That all of said oleomargarine was manufactured outside of the State of Montana, at the city of Chicago, State of Illinois, and the same was contained in packages ranging from 10 pounds to 60 pounds, and shipped from the defendant's factory at Chicago, Ill., to the defendant's warehouse in Silver Bow county, Montana, in said packages.

3. That all of the said oleomargarine was stored in the defendant's warehouse in Silver Bow county, Montana, in the same packages in which it was shipped, and was therefore sold and delivered by defendant in such packages direct from said warehouse in Silver Bow county to the customer and purchaser thereof and all the said sales and deliveries were made in Silver Bow county, Montana.

4. That no part of said oleomargarine herein mentioned was ordered or purchased by said customers until after the arrival of the same in the said county of Silver Bow and storage of the same in defendant's warehouse as aforesaid, and that none of said oleomargarine was shipped from outside the State of Montana direct to any customer, or upon any previous order of any customer.

III.

Defendant further alleges that section 4064 of the Political Code of Montana, as amended, is in violation of and in conflict with the 14th Amendment to the Constitution of the United States in that the effect thereof is to deprive this defendant of its property without due process of law and to deny to this defendant the equal protection of the laws.

IV.

12 Denies each and all of the allegations of said complaint not herein specifically admitted or denied.

Wherefore, defendant having fully answered said complaint prays to be hence dismissed with its just costs.

GUNN & HALL,
Attorneys for Defendant.

(Duly verified.)

Service of the foregoing amended answer accepted, receipt of copy acknowledged and it is hereby stipulated that the same may be filed. Dated this 7th day of July, 1911.

THOMAS J. WALKER,
County Attorney,
By LOUIS P. DONOVAN,
Chief Deputy.

Filed July 10, 1911.

Title of Court.

Title of Cause.

Notice of Motion.

To the above named defendant and to M. S. Gunn, its attorney:

You are hereby notified that on Saturday, the 16th day of September, 1911, at the hour of 9:30 A. M., or as soon thereafter as counsel can be heard, plaintiff will move the court for judgment on the pleadings.

A copy of the motion is herewith served upon you.

T. J. WALKER,
LOUIS P. DONOVAN,
Attorneys for Plaintiff.

Filed September 13, 1911.

13 Title of Court.

Title of Cause.

Motion for Judgment on the Pleadings.

Comes now the above named plaintiff and respectfully moves the court that judgment in the above entitled case be entered in favor of the plaintiff and against the defendant in the sum of four hundred six and 56/100 (\$406.56) dollars, together with the interest thereon at the rate of eight (8%) per cent per annum from the 31st day of December, 1905, to the date of entry of judgment, upon the ground and for the reason that the pleadings in said action show that the above-named defendant, during the years 1904 and 1905, and before the 3-st day of December, 1905, has sold forty thousand six hundred and fifty-six (40,656) pounds of oleomargarine in the said county of Silver Bow, State of Montana, and is liable for the license required to be paid under the provisions of House Bill No. 80 of the Laws of 1901, pp. 143, 145, Session Laws of 1901.

This motion is based upon the pleadings in this case.

T. J. WALKER,
LOUIS P. DONOVAN,
Attorneys for Plaintiff.

Filed September 13, 1911.

Title of Court.

Title of Cause.

Judgment.

14 This matter having come on to be heard before the court, upon plaintiff's motion for judgment upon the pleadings in favor of the plaintiff and against the defendant, and the

said cause having been submitted to the court for consideration and the court being fully advised of the facts and of the law, did, on the 28th day of October, 1911, sustain the said motion of the plaintiff for judgment upon the pleadings in favor of the plaintiff and against the defendant in the sum of four hundred and six and 56/100 (\$406.56) dollars, together with interest thereon at the rate of eight (8%) per cent per annum from the 31st day of December, 1905, to the date of entry of judgment:

Now, therefore, it is ordered, adjudged and decreed, that the plaintiff do have and recover from the above named defendant, Hammond Packing Company, a corporation, the sum of Six Hundred and thirty-six and 94/100 (\$636.94) dollars, with interest thereon at the rate of eight (8%) per cent per annum from date hereof until paid, together with its costs and disbursements in this action necessarily incurred, which are assessed in the sum of — dollars.

Done in open court this 4th day of November, 1911.

JOHN B. McCLENNAN, *Judge*.

Filed November 4, 1911.

15 District Court, Second Judicial District.

STATE OF MONTANA,

County of Silver Bow, ss:

I, the undersigned, Clerk of said District Court, do hereby certify the foregoing to be a true copy of the judgment entered in the within entitled action, and recorded at page 268 in Book U of Judgments; and I further certify that the foregoing papers, attached hereto, constitute the judgment roll in the said action.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said district court this 16th day of November, A. D. 1911.

[SEAL.]

JOHN J. FOLEY, *Clerk*,
By D. W. LEWIS,
Deputy Clerk.

Title of Court.

Title of Cause.

Notice of Appeal.

To the State of Montana, the above named plaintiff, and Thomas J. Walker, County Attorney for Silver Bow county, and Louis P. Donovan, Chief Deputy County Attorney for Silver Bow County, its attorneys:

Please take notice that the defendant in the above entitled action hereby appeals to the supreme court of the State of Montana from the judgment rendered in the above entitled cause and entered in the district court of the second judicial district of the State of Montana, in and for the county of Silver Bow,

on the 4th day of November, 1911, in favor of said plaintiff and against said defendant in the sum of six hundred thirty-six and 94/100 dollars (\$636.94) damages and — dollars (\$—) costs, and from the whole thereof.

Dated this 14th day of November, 1911.

M. S. GUNN AND
GUNN, RASCH & HALL,
Attorneys for Defendant.

Service of the within Notice of Appeal admitted and receipt of copy acknowledged this 15th day of November, A. D. 1911.

THOMAS J. WALKER,
Attorney for Plaintiff.

Filed November 15, 1911.

Clerk's Certificate.

STATE OF MONTANA,
County of Silver Bow, ss:

I, John J. Foley, Clerk of the District Court of the second judicial district of the State of Montana, in and for the county of Silver Bow, do hereby certify that the foregoing transcript contains a true copy of the complaint, bill of exceptions, amended answer, notice of motion for judgment on pleadings, motion for judgment on pleadings, judgment and notice of appeal, except formal parts thereof, as the same appear on file and of record in my office in case No. 12105, entitled The State of Montana, plaintiff, vs. Hammon Packing Company, a corporation, defendant.

17 I further certify that a good and sufficient undertaking on appeal, in due form, has been filed in my office in said cause.

This certificate is made pursuant to an order of one of the Justices of the Supreme Court, authorizing the filing of an abbreviated record, and directing me to certify to the same.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court this 6th day of December, 1911.

[SEAL.]

JOHN J. FOLEY,
Clerk of the District Court.

Service of the within transcript admitted and receipt of copy thereof acknowledged this eighth day of December, A. D. 190—.

ALBERT J. GALEN,
Attorney General,
By W. S. TOWNER,
Assistant Attorney General,
Attorneys for Respondent.

Transcript filed in the Supreme Court of the State of Montana December 8, 1911.

Order for Judgment.

Minutes of Supreme Court, State of Montana.

Twentieth Day of March Term.

WEDNESDAY, April 3d, 1912.

Court convened pursuant to Recess.

Present:

The Hon. Theo. Brantly, Chief Justice.

The Hon. Henry C. Smith, Associate Justice.

The Hon. Wm. L. Holloway, Associate Justice.

John T. Athey, Clerk.

M. N. Race, Marshal.

And the following proceedings were had, to-wit:

3106.

THE STATE OF MONTANA, Plaintiff and Respondent,

v.

HAMMOND PACKING Co., Defendant and Appellant.

This cause this day came on for the judgment and decision of the court.

Whereupon, on consideration, it is now here ordered and adjudged by this court: that the judgment of the district court of Silver Bow county, made and entered on the 4th day of November, 1911, be and the same is hereby affirmed at the cost of the appellant. Opinion by Mr. Justice Smith; Mr. Chief Justice Brantly and Mr. Justice Holloway concurring.

There being no other matters presented for the consideration of the court, court went into recess.

Minutes of the day's proceeding signed by

THEO. BRANTLY,
Chief Justice.

Attest:

JOHN T. ATHEY, *Clerk.*

19 STATE OF MONTANA:

In the Supreme Court, March Term, 1912.

No. 3106.

THE STATE OF MONTANA, Plaintiff and Respondent,
v.
HAMMOND PACKING COMPANY, Defendant and Appellant.

Submitted March 20, 1912; Decided April —, 1912.

Filed April 3, 1912.

JOHN T. ATHEY, *Clerk*.

20 Mr. Justice SMITH delivered the Opinion of the Court.

The complaint in this action alleges that at all times mentioned, the defendant was an Illinois corporation, doing business in the county of Silver Bow and state of Montana; "that on the first day of January, 1904, and upon each succeeding day subsequent thereto, in the years 1904 and 1905, in the county of Silver Bow, state of Montana, the defendant did attempt to carry on, and then and there carried on the business of selling oleomargarine, butterine and imitation of cheese." It is further alleged that between the dates mentioned, the defendant sold certain quantities of oleomargarine, butterine and imitation of cheese, and has failed to pay the license required by law for carrying on said business. The answer admits the corporate character of the defendant and that during the times mentioned it was doing business in Silver Bow county. It denies that the defendant sold any butterine or imitation of cheese, and then further alleges as follows: "That at all the times in the complaint mentioned the defendant had a warehouse and fixed place of business in Silver Bow county, Montana, and carried on in said county the business of selling oleomargarine and other products and merchandise; that at said place of business in said county, between the first day of January, 1904, and the 31st day of December, 1905, the defendant transacted the following business, to-wit: Defendant sold and delivered between said dates 40,656 pounds of oleomargarine in said county of Silver Bow, State of Montana.

"2. That all of said oleomargarine was manufactured outside of the state of Montana, at the city of Chicago, state of Illinois, and the same was contained in packages ranging from ten to sixty pounds, and shipped from the defendant's factory at Chicago, Illinois, to the defendant's warehouse in Silver Bow county, Montana, in said packages.

"3. That all of the said oleomargarine was stored in the defendant's warehouse in Silver Bow county, Montana, in the same packages in which it was shipped, and was thereafter sold and delivered by defendant in such packages direct from said warehouse in Silver Bow county to the customer and purchaser thereof, and all the said sales and deliveries were made in Silver Bow county, Montana.

"4. That no part of said oleomargarine herein mentioned was ordered or purchased by said customers until after the arrival of the same in the said county of Silver Bow and storage of the same in defendant's warehouse as aforesaid, and that none of the said oleomargarine was shipped from outside the state of Montana direct to any customer, or upon any previous order of any customer.

"5. Defendant further alleges that section 4064 of the Political Code of Montana is in violation of and in conflict with the Fourteenth Amendment to the Constitution of the United States in that the effect thereof is to deprive this defendant of its property without due process of law and to deny to this defendant the equal protection of the laws."

The district court entered a judgment on the pleadings in favor of the state of Montana, for the sum of \$406.56 with interest. Defendant appeals.

The sole question presented to this court is as to the constitutionality of paragraph 13, of section 4064 of the Political Code of 1895 as amended by House Bill No. 80, Laws 1901, p. 143, under which the license was demanded, which reads as follows: "13. Every person, company or corporation selling oleomargarine, butterine or imitation of cheese shall pay a license fee of one cent per pound for all these articles sold." Appellant contends that the law is unconstitutional for the following reasons:

1. Because it is not a valid exercise of the police power of the state.

2. It is not a valid exercise of the taxing power of the state, for the reason that section 1, Article XII of the State Constitution only authorizes the legislature to tax property and to impose a license tax on persons and corporations doing business in this state. It is said that the authority to tax for the purpose of raising revenue is limited by this section, which authorizes but one license tax for doing business.

3. It is in conflict with the Fourteenth Amendment to the Constitution of the United States, which declares that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

4. It creates a monopoly in restraint of trade.

5. It is an unreasonable interference with interstate commerce.

Specifically stated, the objections to the law as a revenue measure are as follows, quoting from the brief of counsel for the appellant:

"1. Because, if a license, it is not a tax imposed upon persons or corporations doing business, but is a tax imposed upon persons and corporations selling the articles mentioned, which of itself does not constitute doing business.

"2. Because, if a property tax, it is in violation of the uniformity clause of the Constitution.

"3. Because the Classification made is unwarranted and arbitrary and does not rest upon any reasonable foundation, in consequence

of which the statute is in violation of the Fourteenth Amendment to the Constitution of the United States.

"4. Because the purpose of the statute is to prohibit and restrain the sale of the articles mentioned, under the guise of a tax for revenue.

"5. Because the tax is prohibitive and therefore in violation of the right to liberty, guaranteed by the Constitution.

"6. Because it is vicious class-legislation, clearly discriminatory and intended to confer upon those making and selling dairy products a monopoly."

24 It is claimed that the affirmative allegations of the answer raised a material issue of fact, or, at any rate, that the motion for judgment on the pleadings admitted the truth thereof, and, as this contention is not disputed by the attorney general in his brief, we may assume that the allegations of the answer are true. We find in the answer, however, no allegation to justify the conclusion that the statute grants a monopoly in restraint of trade; nor that, in application, it does not operate equally upon all persons in like situations or engaged in like pursuits; nor that it discriminates, in its operation, against the appellant, or in favor of others dealing in similar commodities, or other commodities, such as butter.

1. We shall assume that the Act imposes a license tax for the purpose of raising revenue; that no attempt is made to impose a property tax; and that it is not a police regulation; also that oleomargarine is a pure and wholesome article of food and commerce, the sale of which cannot be prohibited by law, either directly or by indirection. The sole contention of the attorney general is that the law may be upheld as a measure exacting a license fee from those engaged in the business of selling oleomargarine.

The Act places dealers in oleomargarine, butterine and imitation of cheese in a class by themselves for the purpose of calculating a portion of the license fee to be paid by vendors of goods, wares and merchandise. Section 1 of Article XII of the state Constitution reads, in part, as follows: "* * * The legislative assembly may also impose a license tax, both upon persons and upon corporations doing business in the state." The legislature is not required to tax all occupations equally or uniformly. (State ex rel. Sam Toi v. French, 17 Mont. 54.) The classification does not on its face appear to be arbitrary, unreasonable or unjust. The legislature has power to single out dealers in oleomargarine, butterine or imitation of cheese, and compel them to pay a license, and if the burden falls upon all such dealers alike, no one of them is aggrieved. (Quong Wing v. Kirkendall, 39 Mont. 64; Cunningham v. Northwestern Imp. Co., 44 Mont. 180.) During the period mentioned in the complaint, section 4064, Political Code, as amended by the Laws of 1901, was in force. So much of that section as is material here reads as follows: "Sec. 4064. Every person who at a fixed place of business sells any goods, wares and merchandise, drugs or medicines, jewelry or wares of precious metals, whether on commission or otherwise, and all butchers, must obtain from the county treasurer of the county in which the business is transacted, and for each branch of such business, [a] license, and pay quarterly there-

for an amount of money to be determined by the class in which such person is placed by the county treasurer; such business to be classified and regulated by the amount of the monthly average sales made or hiring done, and at the rate following: Those who are estimated to make average monthly sales to the amount: 1. Of one hundred thousand dollars or more, constitute the first class, and must pay seventy-five dollars per month. [Paragraphs 2 to 12 provide for

the payment of graduated licenses of from sixty dollars to one dollar, depended upon the amount of monthly sales. Paragraph 13 is the one we have under consideration.] 14.

Every person who keeps a public weighing or platform scales for hire shall pay a license of ten dollars per year. 15. Every person or persons who is engaged in the business of selling cigarettes, cigarette paper or materials used in the making of cigarettes, except tobacco, shall pay a license of ten dollars per month, in addition to any other license herein provided for." Paragraph 15 is evidently a police regulation, as well as a revenue measure.

It is contended that in enacting section 4064, supra, and kindred sections, the legislature exhausted the power to impose licenses given it by the Constitution, and for the purposes of this decision we may assume, without deciding, that such was the case. But the appellant goes further and contends that, having enacted the first twelve paragraphs of the section, the legislature was powerless to impose an additional tax on persons engaged in selling oleomargarine at a fixed place of business. This argument is founded in a misconception of the purpose and scope of section 4064. Paragraphs 13 and 15 are as much a part of the section as are the preceding paragraphs. All parts thereof must be read together. The general design of the legislature was to impose a license tax upon persons engaged in selling goods, wares and merchandise at a fixed place of business, graduating the tax, for the most part, according to the amount of monthly sales; but in case such persons sold oleomargarine, butterine or imitation of cheese as a part of the goods, wares and merchandise so handled by them, the proceeds of such sales

should not be included in the monthly sales theretofore mentioned, but such persons should pay a tax of one cent per pound for the privilege of selling those articles. It is very clear that the amounts received from the sales of oleomargarine, butterine or imitation of cheese, were not to be included in the monthly sales mentioned in paragraphs 1 to 12, because the legislature found apt words in paragraph 15 to express its intention to impose an additional license tax on those engaged in selling cigarettes and cigarette material.

We find, then, that the legislature, pursuant to section 1, Article XII of the Constitution, exercised its authority to impose a license tax on persons and corporations doing business in this state, by enacting, (a) that every person who at a fixed place of business sold any goods, wares or merchandise, drugs, medicines, jewelry or wares of precious metals, and all butchers, should pay a graduated license tax in accordance with the amount of their monthly sales; (b) that every person, company or corporation who also sold oleomargarine, butterine or imitation of cheese should pay a license tax, fixed on a

basis of one cent per pound on all such articles sold, not in addition to the license on his or its sales including the sales of those articles, but as a part of the same license, figured on a different basis and not included in the amount of monthly sales; (c) that every person engaged in the business of selling cigarettes or cigarette materials, should pay a license of ten dollars per month in addition to the license on his monthly sales including the sales of those articles. In the preparation of this opinion we have given no thought to the case of a person engaged solely in the business of selling
 28 oleomargarine, butterine or imitation of cheese, and what is said must be read with this in mind.

But it is contended that paragraph 13 of the statute imposes a license tax upon a person or corporation for each sale made in conducting the business, and thereby exacts several licenses for doing a single business. But such is not its purpose or effect. The statute imposes but one license tax for doing business, but the amount thereof is found by making two calculations instead of one. We know of no objection to this method of procedure. Although the terminology of paragraph 13 is somewhat different from that of the preceding paragraphs, we have no doubt that its effect is the same, to-wit, to impose a license tax upon persons and corporations doing business in the state. We have already demonstrated, we think, that no double taxation, or extra taxation, is imposed upon those who at a fixed place of business sell oleomargarine, butterine or imitation of cheese, as well as other articles of merchandise. So far as this appellant is concerned, we find no difficulty in holding that one who sells forty thousand pounds of oleomargarine in two years in one county of the state, is engaged in the business of selling that article and is "doing business" within the meaning of the constitutional provision above quoted, regardless of the admission in the answer that it is also selling other goods, wares and merchandise, at the same fixed place of business. The effect of the statute on other- who may deal in oleomargarine alone, is no concern of the appellant. (Uihlein v. Caplice Commercial Co., 39 Mont. 327.)

29 2. Having decided that the tax in question is a license tax imposed upon persons and corporations doing business in this state as vendors of oleomargarine, for the privilege of carrying on said business, we further hold, on the authority of *Osborn v. Mobile*, 16 Wall. 479; *American Harrow Co. v. Shaffer*, 68 Fed. 750; and 7 Cyc. 483, that the Act is not repugnant to clause 3, section 8 of Article I of the Constitution of the United States, giving to Congress the power to regulate commerce among the several states.

The judgment is affirmed.
 Affirmed.

HENRY C. SMITH,
Associate Justice.

We concur:

THEO. BRANTLY,
Chief Justice.

WM. L. HOLLOWAY,
Associate Justice.

Rehearing denied May 3, 1912.

30 STATE OF MONTANA,
 Office of the Clerk of the Supreme Court, ss:

I, John T. Athey, clerk of the Supreme Court of the State of Montana, do hereby certify that the foregoing, from page 1 to page 29, inclusive, is a complete and true transcript of the record in the case of The State of Montana vs. Hammond Packing Company, a corporation, as appears from the papers, records and proceedings in said cause on file in my office, including the opinion of said court, filed on April 3rd, 1912, in said cause; together with the assignment of errors filed in connection with the petition for a writ of error therein.

And I further certify that there is attached to said transcript the writ of error and citation issued in said cause, which, together with the said transcript and assignment of errors, are transmitted to the Supreme Court of the United States in obedience to the command of said writ of error.

Witness my hand and the seal of said court this 31st day of May, 1912.

[Seal Supreme Court, State of Montana.]

JOHN T. ATHEY,
*Clerk of the Supreme Court of
the State of Montana.*

31 In the Supreme Court of the State of Montana.

HAMMOND PACKING COMPANY, a Corporation, Plaintiff in Error,
vs.

THE STATE OF MONTANA, Defendant in Error.

Petition for Writ of Error.

To the Honorable Theodore Brantly, Chief Justice of the Supreme Court of the State of Montana:

The petition of the Hammond Packing Company, respectfully shows that, on the 3rd day of April, 1912, the Supreme Court of the State of Montana, rendered a final judgment against your petitioner in a certain cause pending in said court wherein the State of Montana was respondent and your petitioner was appellant, affirming the judgment of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, in said cause in favor of said state and against your petitioner as will appear by reference to the record in said cause; and that said Supreme Court is the highest court in said state in which a decision in said cause can be had.

And your petitioner further represents that in said cause as appears from the records therein it was contended by your petitioner that subdivision 13 of section 4064 of the Political Code of Montana of 1895 as amended in 1901, upon which a right of recovery in said cause was based, is in conflict with and repugnant to the 14th amend-

32 ment of the constitution of the United States and particularly the provision thereof declaring that no state shall deny to any person within its jurisdiction the equal protection of the laws and the decision of said Supreme Court in said cause was against said contention and in favor of the validity of said statute; and that it was also claimed by your petitioner as appears from the record in said cause that said subdivision of section 4064 of the Political Code of Montana as amended is in conflict with and repugnant to the provision of the constitution of the United States conferring upon Congress the power to regulate commerce among the several states, which claim was denied by the decision and judgment of said Supreme Court in said cause.

And your petitioner further represents that the said Supreme Court in holding and deciding as aforesaid committed error to the prejudice of your petitioner as will more in detail appear from the assignments of error filed with this petition.

Wherefore, your petitioner prays the allowance of a writ of error returnable in the Supreme Court of the United States, and for citation; and your petitioner will ever pray, etc.

GUNN, RASCH & HALL,
Attorneys for Petitioner.

Let the writ of error issue as prayed.

THEO. BRANTLY,
*Chief Justice of the Supreme Court
of the State of Montana.*

33 [Endorsed:] 3106. In the Supreme Court of the State of Montana. Hammond Packing Company, a corporation, Plaintiff in Error, vs. The State of Montana, Defendant in Error. Petition for Writ of Error. Filed May 6, 1912. John T. Athey, Clerk Supreme Court, State of Montana. Gunn, Rasch & Hall, Att'ys for Plaintiff in Error.

34 In the Supreme Court of the State of Montana.

HAMMOND PACKING COMPANY, a Corporation, Plaintiff in Error,
vs.

THE STATE OF MONTANA, Defendant in Error.

Assignments of Error.

Now comes the plaintiff in error in the above entitled cause and says that the Supreme Court of the State of Montana erred in its decision and judgment in said cause as appears from the record therein, and that the errors committed are as follows, to-wit:

I.

The said court erred in holding and deciding that subdivision 13 of section 4064 of the Political Code of Montana as amended by

House Bill No. 80, laws, 1901, page 143, as construed by said court is not in conflict with or repugnant to the equal protection clause of the 14th Amendment of the Constitution of the United States, which declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

II.

The court erred in holding and deciding that said subdivision 13 of section 4064 of the Political Code of Montana of 1895 as amended in 1901 is valid and not in conflict with or repugnant to the provision of section 8 of Article I of the Constitution of the United States, conferring upon Congress the power to regulate commerce among the several states.

35

III.

The court erred in holding and deciding that the imposition of the tax provided for in subdivision 13 of section 4064 as amended on the sales of oleomargarine, shown by the record to have been made by plaintiff in error, does not deny to plaintiff in error the equal protection of the laws.

IV.

The court erred in holding and deciding that the tax imposed by subdivision 13 of section 4064 as amended on the sales of oleomargarine, admitted in the answer in said cause to have been made, is not an interference with interstate commerce.

V.

The court erred in holding and deciding that plaintiff in error is liable for the payment of the tax provided for in subdivision 13 of section 4064 as amended.

VI.

The court erred in holding and deciding that subdivision 13 of section 4064 is valid.

VII.

The court erred in affirming the said judgment of the district court of Silver Bow County.

Wherefore, the said Hammond Packing Company, plaintiff in error, prays that, for the errors aforesaid, and other errors appearing in the record of the said Supreme Court in said cause, to its prejudice that the said judgment may be reversed.

GUNN, RASCH & HALL,
Attorneys for Plaintiff in Error.

36 [Endorsed:] 3106. In the Supreme Court of the State of Montana. Hammond Packing Company, a corporation, Plaintiff in Error, vs. The State of Montana, Defendant in Error. Assignments of Error. Filed May 6, 1912. John T. Athey, Clerk Supreme Court, State of Montana. Gunn, Rasch & Hall, Att'ys for Plaintiff in Error.

37

In the Supreme Court of the State of Montana.

HAMMOND PACKING COMPANY, a Corporation, Plaintiff in Error,

v.

THE STATE OF MONTANA, Defendant in Error.

Know all men by these Presents: That Hammond Packing Company, as principal, and the United States Fidelity & Guaranty Company of Baltimore, Maryland, as surety are held and firmly bound unto the State of Montana in the sum of Five Hundred Dollars (\$500.00) to be paid to the said obligee, for which payment well and truly to be made they bind themselves and their and each of their successors and assigns jointly and severally by these presents.

Dated this 6th day of May, 1912.

Whereas, the above named Hammond Packing Company has prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Montana:

Now therefore, the condition of this obligation is such that if said Hammond Packing Company shall prosecute said writ of error to effect, and answer all costs if it fails to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

[SEAL.]

HAMMOND PACKING COMPANY,
By M. S. GUNN, *Attorney*.
UNITED STATES FIDELITY &
GUARANTY CO.,
By CHARLES L. FRIEDERICH, S.
Its Attorney-in-Fact.

I hereby approve the foregoing bond and surety this 6th day of May, 1912.

THEO. BRANTLY,
*Chief Justice of the Supreme Court
of the State of Montana.*

38

Certificate of Lodgment.

SUPREME COURT,
State of Montana, ss:

I, John T. Athey, Clerk of said court, do hereby certify that there was lodged with me as such clerk on the 6th day of May, 1912, in the matter of the Hammond Packing Company, a corporation, versus The State of Montana.

1. The original Bond of which a copy is herein set forth.
2. One copy of the writ of error, as herein set forth, for file in in this office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Helena, Montana, this Twenty-ninth day of May, 1912.

[Seal Supreme Court, State of Montana.]

JOHN T. ATHEY,
Clerk Supreme Court of Montana.

39

Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of Montana, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Montana, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had, in an action or suit between the Hammond Packing Company, defendant and plaintiff in error, and the State of Montana, plaintiff and defendant in error, wherein was drawn in question the validity of a statute of said state, on the ground of its being repugnant to the constitution of the United States, and the decision was in favor of its validity, a manifest error has happened to the great damage of the said Hammond Packing Company, plaintiff in error, as, by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ so that you have the same at Washington on the 5th day of July next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 6th day of May, in the year of our Lord one thousand nine hundred and twelve.

[Seal United States District Court, District of Montana, 1890.]

GEO. W. SPROULE,

*Clerk of the United States District Court
for the District of Montana.*

By C. R. GARLOW,
Deputy Clerk.

Allowed by

THEO. BRANTLY,

*Chief Justice of the Supreme
Court of the State of Montana.*

41 [Endorsed:] 3106. In the Supreme Court of the State of Montana. Hammond Packing Company, a corporation, Plaintiff in Error, vs. The State of Montana, Defendant in Error. Writ of error. Filed May 6, 1912. John T. Athey, Clerk Supreme Court, State of Montana.

42

Citation.

UNITED STATES OF AMERICA, ss:

To the State of Montana, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, D. C., within sixty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Montana, wherein the Hammond Packing Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Theodore Brantly, Chief Justice of the Supreme Court of the State of Montana, this 6th day of May, in the year of our Lord one thousand nine hundred and twelve.

[Seal Supreme Court, State of Montana.]

THEO. BRANTLY,
*Chief Justice of the Supreme Court
of the State of Montana.*

Attest:

JOHN T. ATHEY,
*Clerk of the Supreme Court
of the State of Montana.*

Service of the foregoing citation admitted and receipt of copy thereof acknowledged this 6th day of May, 1912.

ALBERT J. GALEN,
Attorney General of the State of Montana.

43 [Endorsed:] 3106. In the Supreme Court of the State of Montana. Hammond Packing Company, a corporation, Plaintiff in Error, vs. The State of Montana, Defendant in Error. Citation. Filed May 6, 1912. John T. Athey, Clerk Supreme Court, State of Montana.

Endorsed on cover: File No. 23.256. Montana Supreme Court. Term No. 278. The Hammond Packing Company, plaintiff in error, vs. The State of Montana. Filed June 15, 1912. File No. 23,256.

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Office Supreme Court, U. S.

FILED

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JAMES D. MAHER

CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 278

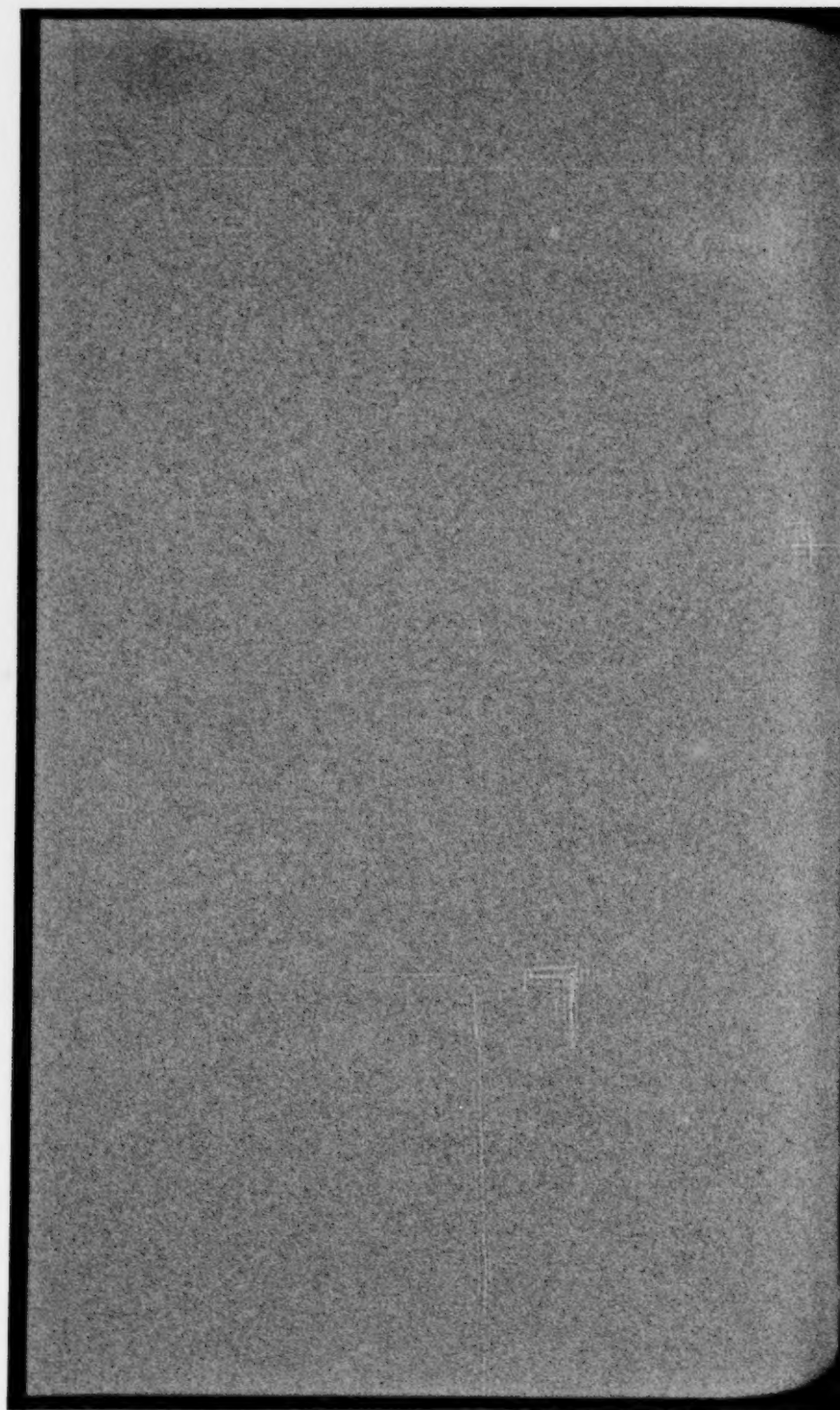
HAMMOND PACKING COMPANY, A CORPORATION,
PLAINTIFF IN ERROR,

vs.

STATE OF MONTANA, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

M. S. GUNN AND
GUNN, RASCH & HALL,
Attorneys for Plaintiff in Error.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 278

HAMMOND PACKING COMPANY, A CORPORATION,
PLAINTIFF IN ERROR,

vs.

STATE OF MONTANA, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The action is for the recovery of a license tax, and is based on Section 4064 of the Political Code of Montana of 1895, as amended by an Act of the Legislative Assembly, approved March 4, 1901, which Section, as amended, is now Section 2763 of the Revised Codes of Montana of 1907. Subdivision 1 of Section 2763 reads as follows:

“Every person, company or corporation selling oleomargarine, butterine or imitation of cheese, shall pay a license of one cent per pound for all of these articles sold.”

The complaint alleges that during the year 1904 the plaintiff in error conducted and carried on the business of selling oleomargarine, butterine and imitation of cheese in Silver Bow County, Montana, and during said period sold one million pounds of oleomargarine, one million pounds of butterine and one hundred thousand pounds of imitation of cheese, and has not paid the license tax of one cent per pound, as required by the provision of the statute above quoted. (Record, pp. 1 and 2).

The answer denies that during the period mentioned in the complaint plaintiff in error sold any butterine or imitation of cheese, but admits the sale during such period of forty thousand six hundred and fifty-six pounds of oleomargarine. The answer also admits that the plaintiff in error has not paid the license tax of one cent per pound, or any part thereof, and has refused to pay the same. It is alleged in the answer that all the oleomargarine sold by plaintiff in error was manufactured in Chicago, Illinois, was shipped from Chicago to the warehouse of plaintiff in error in Silver Bow County in packages ranging from ten to sixty pounds; was stored in the same packages in which it was shipped and

was sold and delivered in such packages direct from said warehouse. The answer further alleges that section 2763 of the Revised Codes, under which this action is brought, is in violation of the Fourteenth Amendment to the Constitution of the United States in that the effect of said section is to deprive defendant of its property without due process of law and to deny it the equal protection of the laws. (Record, pp. 5 and 6).

All of the allegations of the complaint not specifically admitted, are denied by the answer. (Record, p. 6).

The defendant in error moved for judgment on the pleadings, to-wit: the complaint and answer, for the sum of \$406.56, with interest thereon at the legal rate from December 31st, 1905, on the ground that the pleadings show that plaintiff in error is liable for the tax imposed by said section 2763, to the extent of the sales of oleomargarine admitted. (Record, p. 7). This motion was sustained, and judgment was rendered for the sum of \$636.94. (Record, p. 10). An appeal was taken from this judgment to the Supreme Court of the State, and the judgment was affirmed by that court. (Record, p. 11). The case is now before this court on a writ of error to review the judgment and decision of the Supreme Court of the State of Montana.

SPECIFICATIONS OF ERROR.

The Supreme Court of Montana erred in deciding that Subdivision 1 of Section 2763 of the Revised Codes of Montana does not deny the plaintiff in error the equal protection of the laws, and in deciding that said provision of the statute is not in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. (Record, pp. 17 and 18).

BRIEF AND ARGUMENT.

The only question for consideration by this court may be stated as follows:

Does the statute providing for a license tax of one cent per pound on sales of oleomargarine, butterine and imitation cheese deny to plaintiff the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States?

The Supreme Court of the State decided that the tax is imposed for the purpose of revenue in the exercise of the taxing power and that the imposition of such tax is authorized by the Constitution of the State.

It is undoubtedly true that the oleomargarine sold, after having been received, stored and held for

sale in Silver Bow County, was subject to the taxing power of the State.

American Steel and Wire Co. v. Speed, 192 U. S. 500;

Kehrer v. Stewart, 197 U. S. 60.

The oleomargarine sold, having been subject to the taxing power of the State, the motive of the legislative assembly in imposing this tax and the reasonableness of the tax with respect to the amount of same are not open to inquiry in this court.

McCray v. U. S., 195 U. S. 53.

Again, the legislative assembly of Montana is authorized to classify for the purpose of taxation and may lawfully impose a tax upon one class of property or one occupation to the exclusion of other property and other occupations.

Southwestern Oil Co. v. Texas, 217 U. S. 114.

It follows that the only inquiry is whether the placing of oleomargarine, butterine and imitation of cheese in a separate class for the purpose of taxation is a legitimate exercise of the taxing power.

We submit that such a classification is arbitrary, unreasonable and discriminatory, and in vio-

lation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

Oleomargarine is a wholesome article of food, a recognized article of commerce, and its manufacture and sale cannot be prohibited by a state.

Schollenberger v. Pennsylvania, 171 U. S. 1;

Collins v. New Hampshire, 171 U. S. 30.

The State can, in the exercise of the police power, provide reasonable regulations with reference to the manufacture and sale of oleomargarine in order to prevent deception and fraud and in the interest of the health of the people of the State.

Capital City Dairy Co. v. Ohio, ex rel Attorney General, 183 U. S. 238.

In the case last cited it was decided that the State might prohibit the artificial coloring of oleomargarine without extending the prohibition to butter, in view of the fact that oleomargarine is sold in competition with butter, and that there is opportunity for deception and fraud in coloring oleomargarine to give the same the appearance of butter. The statute was enacted in the exercise of the police power. Where, however, as in the case of

Collins v. New Hampshire, *supra*, it is apparent that the purpose and effect of the statute is to prohibit the manufacture and sale of oleomargarine, without regard to the health and welfare of the people, the statute is invalid.

If it is permissible to classify oleomargarine by itself for the purpose of taxation, as the motive of the legislative assembly in imposing a tax and the reasonableness of the tax with respect to the amount are not open to inquiry by the courts, the legislative assembly of the State, under the guise of taxation, can impose a tax upon oleomargarine sufficient in amount to operate as an absolute prohibition against the sale of such article. In other words, the legislature of a state, by assuming to exercise the taxing power, can prevent the sale of oleomargarine as effectively as by requiring the same to be colored pink, and accomplish exactly what this court has decided cannot be accomplished.

It was said by this court, in the case of Spencer v. Merchant, 125 U. S. 345, in speaking of an abuse of the taxing power: "The responsibility of the legislature is not to the courts but to the people by whom its members are elected." The people of a state, interested in the manufacture and sale of butter, are of course in the majority, and if the only remedy for legislation enacted in the exercise of the taxing power, and which has the effect of prohibiting the

manufacture and sale of oleomargarine, is by an appeal to the people, those interested in the manufacture and sale of oleomargarine are powerless to prevent such legislation. The result which might be accomplished by legislation classifying oleomargarine by itself, for the purpose of taxation, should be sufficient to condemn such a classification.

Unless oleomargarine and butter are placed in the same class for the purpose of taxation, as they should be, the conflict between the dairy interests and those interested in the manufacture and sale of oleomargarine, which has been waged throughout the United States for years, will be resolved in favor of the dairy interests by legislation, under the guise of taxation, prohibiting the sale of oleomargarine. The only way to prevent discriminatory legislation, in the exercise of the taxing power, against oleomargarine is by placing butter in the same class with oleomargarine for the purpose of taxation, and thereby making it impossible for the legislature of a state to prohibit the manufacture and sale of one of these articles without prohibiting the manufacture and sale of the other. If this is done, any abuse of the taxing power would be speedily corrected by the people, as there would be no incentive for those interested in the manufacture and sale of oleomargarine, or those interested in the manufacture and sale of butter, to approve of such legisla-

tion.

If this legislation is valid, the legislative assembly may discriminate between merchants selling tea and merchants selling coffee, and between merchants selling ham and merchants selling bacon. In fact, there is no article of food which could not be discriminated against in favor of other articles of food. The legislature can, if such discrimination is permissible, impose a license tax for revenue upon restaurant keepers and hotels serving oleomargarine, while permitting restaurant keepers and hotels serving butter to do business without the payment of any license tax.

As oleomargarine is a pure and wholesome article of food, used as a substitute for butter, the reason for the discrimination made cannot have reference to the nature of the article or the use to which it is applied. The only reason that can be assigned for this classification is that oleomargarine is sold in competition with butter. The reason for the discrimination made is to create a monopoly in favor of butter, and it is not a valid reason. Mr. Cooley, in his work on taxation, (3rd Ed.), page 1133, says:

“License fees may be imposed: 1. For regulation. 2. For Revenue. 3. To give monopolies. 4. For prohibition. The third purpose is inadmissible in any free government, and has not avowedly been had in view at any time in this

country, nor in England since the period immediately preceding the revolution of 1688, so fruitful of arbitrary exactions of every available nature.”

We submit that no classification for the purpose of taxation is reasonable or justifiable, unless all articles used for the same purpose, and which are sold in competition, are placed in the same class. Such a classification as is made by this statute under consideration does violence to the equal protection clause of the Fourteenth Amendment.

Connolly v. Union Sewer Pipe Co., 184 U. S. 540;

Gulf, Colorado & Santa Fe R. R. v. Ellis, 165 U. S. 150.

If the legislative assembly of Montana can classify oleomargarine by itself and impose a license tax of one cent per pound for the sale of such article, it can increase the tax to such an amount as will prohibit the sale of same. The validity of the statute is not to be determined by the amount of the tax imposed.

G. C. & S. F. R. Co. v. Ellis, 165 U. S. 150.

In the opinion in the case just cited this court said:

“It is true the amount of the attorney’s fee which may be charged is small, but if the state has the power to thus mulct them in a small amount it has equal power to do so in a large sum. The matter of amount does not determine the question of right, and the party who has a legal right may insist upon it, if only a schilling be involved. As well said by Mr. Justice Bradley in *Boyd v. United States*, 116 U. S. 616, 635 (29; 746; 752); ‘Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon. Their motto should be *absta principiis*.’

* * * * *

“But it is said that it is not within the scope of the 14th Amendment to withhold from states the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of

equal protection. While, as a general proposition, this is undeniably true (*Hayes v. Missouri*, 120 U. S. 68 (30; 578); *Missouri P. R. Co. v. Mackey*, 127 U. S. 205 (32; 107); *Walston v. Nevin*, 128 U. S. 578 (32; 544); *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232 (33; 892); *Pacific Exp. Co. v. Seibert*, 142 U. S. 339 (35; 1035, 3 Inters. Com. Rep. 810); *Giozza v. Tierman*, 148 U. S. 657 (37; 599); *Columbus S. R. Co. v. Wright*, 151 U. S. 470 (38; 238); *Merchant v. Pennsylvania R. Co.*, 153 U. S. 380 (38; 751); *St. Louis & S. F. R. Co. v. Mathews*, 165 U. S. 1 (ante, p. 251), yet it is equally true that such classification cannot be made arbitrarily. The state may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

The case of *McCray v. U. S.*, 195 U. S. 27, was cited to the supreme court of the State in support of the validity of the tax. That case involved the power of taxation by congress. The question con-

sidered was the validity of the tax of ten cents a pound on artificially colored oleomargarine. It was contended that it was not lawful to impose this tax upon artificially colored oleomargarine without imposing a similar tax upon artificially colored butter. This court held otherwise, following the decision in *Capital City Dairy Company v. Ohio*, 183 U. S. 238. In the opinion it is said:

“Indeed, in the cases referred to, the distinction between the two products was held to be so marked, and the aptitude of oleomargarine when artificially colored, to deceive the public into believing it to be butter, was decided to be so great, that it was held no violation of the due process clause of the 14th Amendment was occasioned by state legislation absolutely forbidding the manufacture, within the state, of oleomargarine artificially colored. As it has been thus decided that the distinction between the two products is so great as to justify the absolute prohibition of the manufacture of oleomargarine artificially colored, there is no foundation for the proposition that the difference between the two was not sufficient, under the extremest view, to justify a classification distinguishing between them.”

The statute under consideration is clearly distinguishable from the Act of Congress considered in the case of *McCray v. U. S.* The statute of Montana

imposes a tax upon the privilege of conducting the business of selling oleomargarine, and is imposed for the purpose of revenue, according to the decision of the supreme court of Montana in this case. The statute applies to all oleomargarine, and is not in any sense a police measure.

Respectfully submitted,

M. S. GUNN, and
GUNN, RASCH & HALL,
Attorneys for Plaintiff in Error.

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Office Supreme Court, U. S.

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IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1913

No. 278.

HAMMOND PACKING COMPANY, a Corporation,
Plaintiff in Error,

vs.

STATE OF MONTANA,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

D. M. KELLY,
Attorney General of Montana.

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Attorneys for Defendant in Error.



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BRIEF FOR DEFENDANT IN ERROR.

Defendant in error admits the statement of facts as given by plaintiff in error in its brief.

BRIEF AND ARGUMENT.

After stating the question for consideration in this appeal as

“Does the statute providing for a license tax of one cent per pound on sales of oleomargarine, butterine and imitation cheese deny to plaintiff the equal protection of the laws in violation of

the Fourteenth Amendment to the Constitution of the United States?"

Plaintiff in Error admits the following propositions:

First, that oleomargarine stored and held for sale within the state is subject to taxation by the state;

Second: That the motive of the state in imposing a tax, and the reasonableness of the tax with respect to the amount thereof, are not open to inquiry by this court;

Third: That the legislature of the state may discriminate between classes of property, and between various occupations in levying taxes. To these admissions as made by the plaintiff in error, the defendant in error wishes to add one more proposition, which it thinks to be of moment in the consideration, discussion and decision of the question involved.

That proposition is:

The State may regulate or prohibit the sale of oleomargarine manufactured within its borders.

Powell vs. Penn., 127, U. S. 678.

Capital City Dairying Co. vs. Ohio, 183 U. S., 238.

It follows as a necessary corollary to this principle that the state may regulate the sale of the same article when it is manufactured without its borders, imported into the state and mingled with the mass of property therein. To hold otherwise is to make the state law a nullity. After admitting the principles above attributed to it, plaintiff in error asserts that it is not within the power of the state to tax the sale of oleomargarine because it is a wholesome food product, capable of being used instead of butter and sold in competition with it. In addition to this contention

plaintiff in error further makes the broad statement that all food products used for the same purposes and which are sold in competition with each other, must be placed in the same class for purposes of taxation. The only basis for this contention seemingly, is the fact that one article of food comes into competition with another. The result of this rule is that all articles of food which come into competition with each other, must be classified together for taxation purposes. Different cuts of meat, different varieties of meat, such as beef and mutton, mutton and pork would have to be in the same category, and if the reasoning is carried far enough beans and all sorts of meat must be classed together, because beans containing a high content of protein, can be substituted for meat in a diet, and might therefore, come into competition with meat. The rule takes no account of differences of value, methods of manufacture, the right of the state to protect against substitution and fraud, or the right of the state to make reasonable classifications, with a view to preventing such abuses.

This court has held that distinction between the two substances, oleomargarine and butter is so great as to "justify a classification distinguishing between them."

McCray vs. U. S., 195 U. S., 27.

As noted above, the argument of plaintiff in error is based upon the fact that the two substances are sold in competition with each other. This assumes that they are enough alike in appearance and taste to make them indistinguishable by the layman; for if there was a marked difference in appearance and taste, each would be sold upon its own merits, and there would be no competition between them, except that arising from the preferences of the purchaser.

It was upon the difference between the two and the possibility of substituting the one for the other that this court held a distinction in classification reasonable. *McCray vs. U. S. Supra.* This leads to the result that the plaintiff in error supports his contention upon the very facts upon which this court based its reason for holding valid a distinction between oleomargarine and butter.

Plaintiff in error distinguishes between the oleomargarine Act of 1886, 24 Statutes, 209, and Section 2763, Revised Codes of Montana, 1907, Subdivision 1 of which, referring to the sale of oleomargarine is as follows:

“Every person, company or corporation selling oleomargarine, butterine or imitation of cheese, shall pay a license of one cent per pound for all of these articles sold”

on the ground that the Act of Congress, 24 Statutes, 209, was a police measure while the law of Montana is a revenue measure. This distinction assumes the position that it may be lawful to destroy competition between oleomargarine and butter by means of a police regulation, but unlawful to do so by means of an excise tax. In other words, the manner of violating the 14th amendment to the Constitution of the United States, and not the fact of its being violated, seems to be complained of.

By a later act than the oleomargarine Act of 1886, oleomargarine has been placed directly within the jurisdiction of the state, for the purpose of taxation and regulation. Beyond question Congress cannot add to nor detract from the powers conferred upon it by the Constitution of the United States, neither can it confer upon a state the power vested by the Con-

stitution exclusively in Congress, but removing "an impediment to the enforcement of the state law," is not granting an additional power to the state.

In re Rahrer, 140 U. S. 545.

The power of the state has been specifically recognized by the Congress of the United States and in the Act of Congress approved February 9th, 1902, 32 Statutes at Large, 193, which Act deals specifically with oleomargarine, etc., and imposes a certain license tax thereon, specifically provides that the said products,

"Transported into any state or territory, or the District of Columbia, and remaining therein for use, consumption, sale or storage, therein, shall upon the arrival within the limits of such state, or territory, or the District of Columbia, be subject to the operation and effect of the laws of such state, or territory, or the District of Columbia enacted in the exercise of its police powers to the same extent and in the same manner as though such articles or substances had been produced in such state or territory, or the District of Columbia, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

This Act of Congress imposes a tax upon oleomargarine of ten cents per pound where the same is colored to imitate butter and of one-fourth of one cent per pound where the same is not colored. The police and licensing powers of the state are as great within the limits of the state as are the powers of Congress within the territory subject to the jurisdiction of the United States. If then, this law of the state(Sec. 2763) is void as being an invasion of the Fourteenth Amendment of the Constitution of the United States, this law of Congress must also be void for the same

reason. Yet, the Supreme Court of the United States has twice sustained the constitutionality of this law of Congress.

McCray v. U. S., 195 U. S. 27.

Cliff v. U. S., 195 U. S. 159.

The police power of the state is further discussed in,

People v. Freeman, (Ill.) 90 N. E. 366;

Plumley v. Mass., 155 U. S. 461."

The power of the State Legislature, under the State Constitution, to impose a license for revenue or for regulation, cannot be successfully contested. Section 1, Article XII. of the Constitution of Montana, provides:

"The necessary revenue for the support and maintenance of the State shall be provided by the Legislative Assembly, which shall levy a uniform rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, except that specially provided for in this article. The Legislative Assembly may also impose a license tax, both upon persons and upon corporations doing business in the state."

In *State vs. French*, 17 Montana, 54, the Supreme Court of the State of Montana, held that the license feature is not within the uniformity clause of the state constitution, and in *State v. Camp Sing*, 18 Montana, 128, the Supreme Court of Montana held that the Legislature of the State has authority under the state constitution to impose a license tax, either with a view to providing revenue or in the exercise of the police power.

The exercise of the license power expressed in the Constitution is necessarily arbitrary whether exer-

cised for revenue or under the police power. Both rest in the judgment and largely in the discretion of the Legislature. It is a power vested in the legislative department of the government, and whether wise or unwise, expedient or otherwise, necessary or unnecessary, are not questions which appeal to the judicial department.

“If all that can be said of this legislation, is that it is unwise or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine as an article of food, their appeal must be to the legislature or to the ballot box, not to the judiciary: The latter cannot interfere without usurping powers committed to another department of government.”

Powell v. Penn., 127 U. S., 678, 686.

Before such laws can be declared null and void they must contravene some right guaranteed to the citizen by some authority higher than the State Legislature. Hence, unless there is some provision of the laws or Constitution of the United States which prohibits the Legislature from enacting the law in question, it cannot rightfully be declared void.

In *State v. Camp Sing*, supra, the Supreme Court of Montana so thoroughly analyzed the authority of the state in the exercise of its power, in the enactment of laws relating to licenses either for revenue or regulation, that no further authority need be cited, to the effect that the exercise of such power is not prohibited to the State Legislature by the state constitution.

It was in that case claimed by the respondent that the law then under consideration was not a valid exercise of the police power of the state and that the license there imposed was not a valid exercise of the taxing power of the state. The Court declined to

decide whether the statute was under the police power or the taxing power, but said:

“In either event it is in our opinion immaterial whether the license tax is for regulation or for revenue and the distinction in license fees as to whether they are for regulation or for revenue is not important in the case. Even if the license tax be for revenue, which it probably is, and if it should therefore be construed a tax as that term is used in the cases distinguishing between a tax and a license fee for regulation, it is in any event a license tax provided for by the Constitution whether imposed for either purpose.”

In other words, a license may be imposed either for regulation or for revenue and it is immaterial under which heading the license is placed. It would not be any more valid or any more invalid if called by either name.

And the license provision of the State Constitution not being within the uniformity clause relating to taxation (*State v. French*, *supra*) it necessarily follows that it is no objection to the law that a similar tax, if it is a tax, is not imposed upon other food products. If a tax of two cents per pound were levied on oleomargarine and one cent per pound on butter the inequality would be just as great as it is under this law where one cent per pound is placed on oleomargarine and butter is not taxed at all. The “equal protection of law” as expressed in the Constitution of the United States,

“Simply requires that all persons subjected to such legislation shall be treated alike in like circumstances and conditions, both in the privilege conferred and the liabilities imposed.”

Magoun v. Ill. T. & S. Bank, 170 U. S, 283-293.

It,

“Requires the same means and methods to be applied impartially to all the constituents of a class, so that the law shall operate equally and uniformly upon all persons in similar circumstances.”

Kentucky Ry. tax cases, 115 U. S. 321.

“No doubt can be entertained of the right of a state legislature to tax trades, professions or occupations in the absence of inhibition in the state constitution in that regard.”

Ficklen v. Shelby Co. Taxing Dist., 145 U. S. 1.
The State,

“May if it chooses exempt certain classes of property altogether; may impose different specific taxes upon different trades or professions; may vary the rates of excise upon various products; may tax real and personal estate in a different manner; may tax visible property only and not securities; may allow or not allow deductions for indebtedness. All such regulations and those of like character, so long as they proceed within reasonable limits and general usage are within the discretion of the State Legislature or the people of the state in confirming their constitution.”

Connelly vs. Union Sewer Pipe Co., 184,
U. S. 562.

Further on in the Connelly decision, this Court having previously referred to Magoun v. Ills. T. & S. Bank, 170 U. S. 283 and American Sugar Refining Co. vs. Louisiana, 179 U. S. 89, said:

“It is sufficient to say that these cases had reference to the taxing power of the state and involve considerations that could not in the nature of things apply to a state enactment like the one involved in the present case. The power to tax

persons and property is an incident of sovereignty, and the extent to which it may be exercised has been adjudicated in numerous cases. Taxing laws, it has been well said, furnish the measure of every man's duty in support of the public burdens and the means of enforcing it. A tax may be imposed only upon certain calling or trades or when the state exercises its power to tax it is not bound to tax all pursuits or all property that may legitimately be taxed for government purposes. It would be an intolerable burden if the state could not tax any property or calling unless at the same time it taxed all property or all callings. Its discretion in such matters is very great and should be exercised solely with reference to the general welfare as involved in the necessity of taxation for the support of the state. The state may, in its wisdom classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a Court of the United States so long as the classification does not invade the rights secured by the Constitution of the United States."

In *Armour Packing Co. vs. Lacy*, 200 U. S. 226, 235 the Supreme Court of the United States again affirming the doctrine as to the right and power of the state relative to the subject of license and taxation quoted at length from *Osborne v. Florida* 164 U. S. 650.

"The Act in question does not deny petitioner the equal protection of the laws as the tax is imposed upon the managing agent both of domestic and of foreign houses * * * There is no discrimination in favor of the agents of domestic houses, and while we may suspect that the act was primarily intended to apply to agents of ultra state houses, there is no discrimination upon the face of the act and none so far as the record shows upon its practical administration. As we have frequently held, a state has the right to classify occupation and to impose different taxes

upon different occupations. Such has been constantly the practice of courts under the internal revenue laws (*Cook v. Marshall Co.*, 196 U. S. 261, 275). What the necessity is for such tax and upon what occupations it shall be imposed, as well as the amount of the imposition are exclusively within the control of the State Legislature. So long as there is no discrimination against citizens of other states, the amount and necessity of the tax are not open to criticism here."

The same question and power of the state is fully discussed by the United States Supreme Court in *McLean vs. Arkansas*, 211, U. S. 539, 547 and cases there cited. The statute in question applies indiscriminately to every person, company or corporation selling oleomargarine and the Supreme Court of the United States has in the cases above cited and many others therein referred to held that the exercise by the State of the power of regulating or licensing is not an invasion of the Federal Constitution.

It is also urged by appellant that said Section 2763, Revised Codes of Montana, 1907, does not in any manner prohibit the sale of impure oleomargarine. This law if standing alone might not be an adequate protection against the sale of the impure product but that fact does not take from the State Legislature the power to impose the license required by the act and the section when taken in connection with other laws does provide protection from the sale of impure products. ~~Ch. 130, Laws 1911, pure food law.~~ Chapter 130, the Laws of the 12th Legislative Assembly of the State of Montana (Session Laws, 1911, 358), known as the "Pure Food and Drug Law" is practically an enactment into state law of the Act of Congress of June 30, 1906, relating to pure food and drugs (34

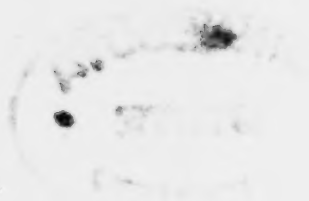
Stat. at Large, 768), to which Act of Congress, the state law makes specific reference.

Respectfully submitted,

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Attorneys for Defendant in Error.

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233 U. S. Argument for Plaintiff in Error.

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MONTANA.

No. 278. Submitted March 11, 1914.—Decided April 13, 1914.

So long as it does not interfere with interstate commerce, a State may restrict the manufacture of oleomargarine in a way that does not hamper that of butter. The classification is reasonable and does not offend the equal protection clause of the Fourteenth Amendment. *Capital City Dairy Co. v. Ohio*, 183 U. S. 238.

A State may forbid the manufacture of oleomargarine altogether without violating the due process or equal protection provisions of the Fourteenth Amendment. *Powell v. Pennsylvania*, 127 U. S. 678.

A State may express and carry out its policy in restricting and forbidding the manufacture of articles either by police, or by revenue, legislation. *Quong Wing v. Kirkendall*, 223 U. S. 59.

45 Montana, 343, affirmed.

THE facts, which involve the constitutionality under the due process and equal protection clauses of the Fourteenth Amendment of a statute of Montana imposing a license tax on the carrying on of the business of selling oleomargarine, are stated in the opinion.

Mr. M. S. Gunn for plaintiff in error:

The statute providing for a license tax of one cent per pound on sales of oleomargarine, butterine and imitation cheese denies to plaintiff due process of law and the equal protection of the laws in violation of the Fourteenth Amendment.

The Supreme Court of the State decided that the tax is imposed for the purpose of revenue in the exercise of the

taxing power and that the imposition of such tax is authorized by the constitution of the State.

The oleomargarine sold, after having been received, stored and held for sale in Silver Bow County, was subject to the taxing power of the State. *Am. Steel & Wire Co. v. Speed*, 192 U. S. 500; *Kehrer v. Stewart*, 197 U. S. 60; *McCray v. United States*, 195 U. S. 53.

The legislative assembly of Montana is authorized to classify for the purpose of taxation and may lawfully impose a tax upon one class of property or one occupation to the exclusion of other property and other occupations. *Southwestern Oil Co. v. Texas*, 217 U. S. 114.

The only inquiry is whether the placing of oleomargarine, butterine and imitation of cheese in a separate class for the purpose of taxation is a legitimate exercise of the taxing power and whether such a classification is not arbitrary, unreasonable and discriminatory, and in violation of the equal protection clause of the Fourteenth Amendment.

Oleomargarine is a wholesome article of food, a recognized article of commerce, and its manufacture and sale cannot be prohibited by a State. *Schollenberger v. Pennsylvania*, 171 U. S. 1; *Collins v. New Hampshire*, 171 U. S. 30.

While the State can, in the exercise of the police power, provide reasonable regulations with reference to the manufacture and sale of oleomargarine in order to prevent deception and fraud and in the interest of the health of the people of the State, *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, it may not abuse the taxing power. See *Spencer v. Merchant*, 125 U. S. 345; *Cooley on Taxation* (3d ed.), p. 1133.

No classification for the purpose of taxation is reasonable or justifiable, unless all articles used for the same purpose, and which are sold in competition, are placed in the same class. Such a classification as is made by this statute

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under consideration does violence to the equal protection clause of the Fourteenth Amendment. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540; *Gulf, Col. &c. R. R. v. Ellis*, 165 U. S. 150. *McCray v. United States*, 195 U. S. 27, distinguished.

Mr. D. M. Kelly, Attorney General of the State of Montana, and *Mr. J. H. Alvord*, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action to recover a license-tax of one cent per pound sold for carrying on the business of selling oleomargarine. The answer, with some allegations not now material, admitted the facts and set up that § 4064 of the Political Code of Montana as amended by § 2763, Revised Codes, by which the tax was imposed, violates the Fourteenth Amendment. That is the only question raised here, so that other incidental or preliminary matters need not be mentioned. Judgment was entered for the State on the pleadings and the judgment was affirmed by the Supreme Court of the State.

The argument for the plaintiff in error is that, the tax being pronounced or assumed by the state courts to be a tax for revenue, it is unjustifiable to put oleomargarine in a class by itself and to discriminate, for instance, between it and butter. But we see no obstacle to doing so in the Constitution of the United States. Apart from interference with commerce among the States, a State may restrict the manufacture of oleomargarine in a way in which it does not hamper that of butter. *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, 245, 246. It even may forbid the manufacture altogether. *Powell v. Pennsylvania*, 127 U. S. 678. It may express and carry out its

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policy as well in a revenue as in a police law. *Quong Wing v. Kirdendall*, 223 U. S. 59, 62. The case really has been disposed of by previous decisions of this court. *McCray v. United States*, 195 U. S. 27, 62, 63.

Judgment affirmed.

